



Mugendi Karigi & Company Advocates & another v Doric Industries Limited & another (Miscellaneous Application E764 of 2021 & Civil Cause 3285 of 2016 (Consolidated)) [2024] KEHC 3517 (KLR) (Commercial and Tax) (21 March 2024) (Ruling)

Neutral citation: [2024] KEHC 3517 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX**

**MISCELLANEOUS APPLICATION E764 OF 2021
& CIVIL CAUSE 3285 OF 2016 (CONSOLIDATED)**

**PM MULWA, J
MARCH 21, 2024**

BETWEEN

MUGENDI KARIGI & COMPANY ADVOCATES ADVOCATE

AND

DORIC INDUSTRIES LIMITED RESPONDENT

**AS CONSOLIDATED WITH
CIVIL CAUSE 3285 OF 2016**

BETWEEN

DORIC INDUSTRIES LIMITED PLAINTIFF

AND

CFC STANBIC BANK LIMITED DEFENDANT

RULING

1. Before the court is the client’s Chamber Summons application dated 17th February 2022 filed under Order 11 of the Advocates (Remuneration) Order.
2. The applicant sought an order to set aside Hon. E.M. Nyakundi’s decision delivered on 3rd February 2022 as it relates to the reasoning and determination of the bill of costs and an order for the court to re-assess the fees due in the advocate’s bill of costs dated 8th October 2021. Further the applicant sought an order to have time enlarged for the purpose of filing this application.



3. The grounds of the application were that the advocates filed a bill of costs dated 3rd November 2021 in this court and which was opposed by the clients on grounds that the court had no jurisdiction and that it was wrongly based on schedule 6 instead of 7 of the Advocates Remuneration Order (hereinafter the ARO). The taxing officer taxed the advocate's bill of costs at an all-inclusive amount of Kshs.118,708.60.
4. The client contended that the taxing officer acted contrary to well settled principles of law as she taxed a matter that originated and was determined before the subordinate court under schedule 6 of the ARO.
5. Further that the taxing officer misdirected herself on the law by allowing items 4-39 of the bill of costs while the same are not provided for under schedule 7 of the ARO.
6. The client averred that the court ought to consider the issue of jurisdiction, adjust the figure and re-assess the fees due as the current all-inclusive sum is manifestly high and contrary to the ARO.
7. The advocate opposed the instant application vide a replying affidavit sworn on 25th February 2022 by Morris M. Karigi.
8. He averred that the affidavit in support of the application is incurably defective and liable to being struck out for failure to commission the affidavit in accordance with the provisions of the *Oaths and Statutory Declarations Act*, Cap 15.
9. That a reference ought to be filed within fourteen days after the decision has been rendered with no room for enlargement of time or leeway for the respondent to move the court after the expiry of the stated time frame.
10. It was averred that the issues raised in the instant application are far-fetched and intended to mislead this court since the taxing master considered all the material placed before her in arriving at her decision. The court was urged to strike out the application.

Analysis and determination

11. The client and the advocate filed written submissions dated 25th March 2023 and 3rd June 2022 respectively.
12. I have perused the application herein, the grounds on its face and the affidavit filed in support thereof. I have also perused the replying affidavit by the respondent as well as the written submissions by counsel for parties. I am of the considered opinion that the issues that arise for determination are: -
 - i. Whether the affidavit in support of the application was properly commissioned;
 - ii. Whether the reference herein was filed out of time;
 - iii. Whether the Taxing Officer had the requisite jurisdiction to tax the respondent's Bill of Costs;
 - iv. Whether the respondent's Advocate-Client Bill of costs dated 8th October 2021 was taxed under the correct Schedule of the Advocates Remuneration Order;
 - v. Whether the Taxing Officer erred in principle in awarding the taxed costs.



Was the affidavit in support of the application properly commissioned?

13. Section 5 of the [Oaths and Statutory Declarations Act](#), Cap 15 Laws of Kenya provides as follows: -

“Every commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made.”

14. In the case of *In re MWO (Minor)* [2021] eKLR the court held:

“It is a legal requirement that an affidavit be commissioned by either a Magistrate, a Commissioner for Oaths or by a Notary Public. An affidavit is a sworn statement which contains matters of evidence deponed on oath and as such legal consequences such as perjury would attend if one is found to have sworn a false affidavit. Therefore, an affidavit must be executed on oath by the deponent. An affidavit which has not been properly commissioned is at best a mere signed statement of facts.

It is the commissioning of the affidavit by an authorised officer which elevates the signed statement to the status of an affidavit. Therefore, commissioning of the document is a crucial step without which the statement cannot be deemed to be an affidavit. Failure to commission an affidavit cannot be dismissed as a mere technicality and is an omission which cannot be ignored and/or overlooked by the court.”

15. In this case, the supporting affidavit was sworn by Francis Ngigi Jason on 18th February 2022 and was signed by him. However, a commissioner of oaths stamp is not present alongside the deponent’s signature instead only a signature of the alleged commissioner for oaths was appended thereto.

16. As there is no commissioner of oaths stamp, the name and identity of the commissioner of oaths is unknown. It cannot be verified that the signature appended to the affidavit was by a qualified Commissioner for Oaths.

17. I find that the affidavit was not properly commissioned as required under the [Oaths and Statutory Declarations Act](#), it is therefore defective. Without proper commissioning of the affidavit, it is not a sworn statement and there is no oath. Accordingly, it is struck out.

On whether the reference herein was filed out of time

18. The respondent referred to the provisions of Section 51 of the Advocate’s Act, Rule 11 of the ARO and the case of *Kilonzo & Co. Advocates v John Njenga Mututho* [2012] eKLR and submitted that the application herein was filed out of time. The applicant on the other hand cited the case of *Elijah Njuguna Njoki v Peter Muriu Njuguna & 4 others* [2021] eKLR and submitted that time starts running from the time when the Taxing Officer gives reasons for her decision which was on 17th February 2022, thus the instant application was filed within the set timelines prescribed by law. It further submitted that in the event that it was not filed in time, it has sought for leave for it to be deemed as duly filed.

19. Rule 11 (1) & (2) of the Advocates Remuneration Order provides for the procedure for appeal against the decision of a Taxing Officer as hereunder: -

1. Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.



2. The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection.
20. Based on the above, a dissatisfied party is required to first give the Taxing Officer notice in writing within 14 days of his decision of the items of taxation to which he objects. Thereafter, the Taxing Officer shall forward to the objector the reason(s) for his decision, and the objector may within fourteen days from receipt of the said reasons, make an application commonly referred to as a reference to a judge by way of chamber summons, setting out the grounds of objection.
21. In this case, the Taxing Officer delivered a ruling on the respondent's Advocate-Client Bill of costs dated 8th October 2021 on 1st February 2022. Subsequently, on 2nd February 2022 the applicant wrote to the Taxing Officer requesting for a copy of the ruling and calculation on how she arrived at the taxed amount but the Taxing Officer is yet to respond to the said letter. However, a copy of the Taxing Officer's ruling and reasons for taxation was posted.
22. This court has carefully looked at the ruling of the Taxing Officer and it is quite obvious that the Taxing Officer gave reasons for his findings. In the case of *Ahmed Nassir v National Bank of Kenya Ltd* [2006] E.A the Court in dealing with a similar situation held that: -
- “Although Rule 11(1) of the Advocates Remuneration Order stipulates that any party who wishes to object to the decision of the Hon. Taxing Officer should do so within 14 days, after the said decision and thereafter file his reference within 14 days from the date of receipt of the reasons, where the reasons for the taxation on the disputed items in the bill are already contained in the considered ruling, there is no need to seek for further reasons simply because of the unfortunate wording of Sub-rule (2) of Rule 11 of the Advocates Remuneration Order demands so. The said Rule was not intended to be ritualistically observed even when reasons for the disputed taxation are already contained in the formal and considered ruling.”
23. Rule 11(2) of the ARO provides that upon receipt of the Taxing Officer's reasons, the applicant shall within fourteen days file a reference. The applicant wrote to the Taxing Officer requesting for a copy of the ruling on 2nd February 2022. Thereafter, the Taxing Officer posted his ruling. For this reason, the applicant ought to have filed the instant application on or before 15th February 2022 which would have been after the lapse of fourteen days from the date when the applicant sought for a copy of the Taxing Officer's ruling, and when the ruling, the subject of this application was posted.
24. The instant application was filed on 18th February 2022 which is as correctly submitted by the applicant three days late. Rule 11(4) of the Advocates Remuneration Order gives this Court discretion to enlarge time within which to file a reference, it states that: -
- “The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for the taking of any step; application for such an order may be made by chamber summons upon giving to every other interested party not less than three clear days' notice in writing or as the Court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired”
25. In view of the fact that the application herein was filed three days late, I am of the considered opinion that the delay is not inordinate. Therefore, I exercise my discretion in favour of the applicant and deem the application herein as duly filed.



Did the Taxing Officer possess jurisdiction to tax the respondent's Bill of Costs?

26. The applicant relied on the case of *Nyamongo & Nyamongo Advocates v Pan Africa Insurance Co Ltd & Another* [2016] eKLR and contended that since the respondent's bill of costs emanated from the lower court, it ought to have been taxed by the Chief Magistrate and not the High Court Deputy Registrar.
27. Notably the bill of costs that was presented before the Taxing Officer was an Advocate-Client bill of costs and not a party and party costs. It is trite law that after an Advocate costs have been taxed, for the taxed costs to be enforced, the Advocate has to request for a Certificate of Taxation and thereafter subject the said certificate to the provisions of Section 51(2) of the *Advocates Act*. In view of the foregoing, I am of the considered opinion that it is party and party costs that are subjected to the jurisdiction of the Chief Magistrates Court for assessment. An Advocates Costs on the other hand have to be taxed by a Taxing Officer who will award an Advocate costs that are commensurate to work done.
28. In arriving at the above conclusion, I am persuaded by the Court's holding in the case of *Tom Ojienda & Associates Advocates v County Government of Narok* (Misc. Appl. E608 of 2019) [2021] KEHC 452 (KLR) where it was held that: -
- “Be that as it may, this court takes the view, that the Registrar of Supreme Court taxes party to party costs arising from the trial court's award of Costs in the specific matter. The Advocate-Client Bill of Costs is considered a commercial contract between the parties; advocate and client(s) enter into an Agreement; for the advocate to offer legal services and the client (s) to pay for those services rendered by the Advocate and thus such a contract is enforced & taxed by Taxing Officers within the Commercial & Tax Division of the High Court.”
29. In the end, I find that the Taxing Officer had the requisite jurisdiction to tax the respondent's Advocate-Client bill of costs dated 8th October 2021.

Whether the respondent's Advocate-Client Bill of costs dated 8th October 2021 was taxed under the correct Schedule of the ARO

30. The Advocate-Client Bill of Costs dated 8th October 2021 originated from a suit filed in the Chief Magistrates Court, a fact which is not disputed. Paragraph 51 of the ARO provides that:
- “Costs in subordinate courts according to Schedule 7
- Subject to paragraph 22, the scale of costs applicable to proceedings in subordinate courts (other than Kadhi's Courts) is that set out in Schedule 7.”
31. The applicant submitted that the correct schedule for taxing of lower court matters is Schedule 7 of the ARO thus the Taxing Officer erred in taxing the respondent's Bill of Costs under Schedule 6 of the ARO. In addition, the claim in the lower court was for Kshs. 59,798.50 hence it is absurd that the Taxing Officer awarded the respondent costs of Kshs. 118,708.60.
32. The respondent on the other hand submitted that the Taxing Officer was duly guided by Schedule 7 Part A of the Advocates Remuneration (Amendment) Order 2014 in taxing the respondent's bill of costs.
33. Upon perusal of the Taxing Officer's Ruling, the Taxing Officer at page 4 paragraph 2 of the said ruling stated that the applicable law is Schedule 6 of the Advocates Remuneration (Amendment) Order 2014.



However, at paragraph 4 she refers to Schedule 7 Part A of the Advocates Remuneration (Amendment) Order 2014 and proceeded to tax the respondent's Bill of Costs under the said Schedule.

34. Accordingly, this Court finds that the respondent's Advocate-Client Bill of Costs dated 8th October 2021 was taxed under the correct Schedule of the ARO.

Did the Taxing Officer err in principle in awarding the taxed costs?

35. It is now settled law that the High Court can only interfere with the Taxing Officer's decision where there has been an error in principle and not solely on questions of quantum as that is an area where the Taxing Officer is more experienced and therefore more apt to the job. I am bound by the Court of Appeal's decision in the case of *Kipkorir, Tito & Kiara Advocates v Deposit Protection Fund Board* [2005] eKLR where the Court made the following observation:

“On reference to a Judge from the Taxation by the Taxing Officer, the Judge will not normally interfere with the exercise of discretion by the Taxing Officer unless the Taxing Officer, erred in principle in assessing the costs.”

36. On instruction fees, the Taxing Officer applied the higher scale and thereafter raised it by 50% thereby awarding the respondent Kshs. 45,000/= as instruction fees. I agree with the Taxing Officer that the higher scale was applicable in this case since it is not disputed that the suit that gave rise to the respondent's bill of costs was defended. However, there is no evidence before this Court and/or before the Taxing Officer on whether or not the first hearing for the suit before the subordinate Court had been confirmed before the respondent's Bill of Costs was filed.

37. The applicant contended that judgment in the suit before the lower court had not yet been entered thus Schedule 7A (1) (c) of the Advocates Remuneration Order is applicable. From the record, it is evident that the suit that gave rise to the respondent's Bill of Costs was withdrawn vide a consent filed in Court on 23rd May 2017. For this reason, the Taxing Officer ought to have reduced the instruction fees of Kshs. 30,000/= by 15% as provided for under Schedule 7A (1) (c) of the ARO.

38. Accordingly, this Court finds that the award of Kshs.30,000/= on instruction fees is excessive and it is therefore substituted with an award of Kshs. 25,500/=.

39. As stated hereinabove, the Taxing Officer increased the instruction fees by 50%, however she did not give any explanations, reasons, and/or justification for the said increase. I am alive to the provisions of Schedule 7B of the ARO which provides that the fees prescribed in A above shall be increased by 50% in the case of Advocate-Client costs. It is now well settled that the aforementioned provisions are only applicable where there has been a determination of party and party costs under Schedule 7A. In *Nyangito & Co Advocates v Doinyo Lessos Creameries Ltd* [2014] eKLR, the Court held that:

“With respect to the increase under part B of schedule VI my understanding is that such increase is only applicable where there has been a determination of the party and party fees under Part A of the said schedule in which case instead of taxing the Advocate/Client bill the court may simply decide to increase the amount of party and party costs under part A as provided under part B. In this case there is no evidence that there was a determination on party and party costs in order for part B to be invoked.”

40. In view of the fact that no evidence has been adduced before this Court and/or before the Taxing Officer on whether or not a party and party bill of costs arising from the suit in the subordinate court has been taxed, I find that the Taxing Officer erred in increasing the instruction fees by 50%.



41. The Taxing Officer awarded the respondent getting up fees at Kshs. 10,000/=. The applicant submitted that Schedule 7 does not provide for getting up fees thus it should not have been awarded by the Taxing Officer. Having considered Schedule 7 of the ARO, I agree with the applicant that it does not provide for getting up fees thus the Taxing Officer erred in awarding the respondent Kshs. 10,000/= in getting up fees. The said amount is therefore taxed off.
42. The Taxing Officer allowed items 4-39 as drawn, however a look at the provisions of Schedule 7 of the ARO, it does not provide for item Nos. 4, 5, 6, 8, 9, 10, 11, 12, 14, 15, 16, 18, 19, 20, 21, 22, 24, 26, 27, 28, 29, 30, 31, 32, 33, 36, 37, 38, & 39. Further Schedule 7A of the ARO under note No. 1 provides that:
- “When an order has been made in general terms for the payment of costs by either party and an advocate has been employed, those costs, in addition to the court fees, shall be computed under this Schedule, which shall be the minimum fee, and shall include (except as may be provided) taking instructions, drawing or perusing documents, pleadings or similar documents, engrossing and filing documents, and all necessary attendance at court or chambers.”
43. Based on the above passage, I find that the Taxing Officer erred in awarding costs under item Nos. 4, 5, 6, 8, 9, 10, 11, 12, 14, 15, 16, 18, 19, 20, 21, 22, 24, 26, 27, 28, 29, 30, 31, 32, 33, 36, 37, 38, & 39. Consequently, the said items are hereby taxed off.
44. Item No. 7 had been taxed at Kshs. 1,250/= but is hereby reviewed upwards to Kshs. 3,000/= as provided for under Schedule 7(5) of the ARO. Item 13 had been taxed at Kshs. 1,100/= but is hereby reviewed upwards to Kshs. 1,400/= as provided for under Schedule 7(10) (i) of the ARO. Item Nos. 17, 23, & 25 shall not be disturbed as they had been drawn and taxed to scale. Item 34 is taxed down to Kshs. 2,100 since it is with regards to attending Court for hearing of an application which ordinarily is not expected to last a whole day. Item 35 is taxed off since it refers to the same date as item 36 which refers to attending Court for a mention. It is not clear whether on 6th July 2016 parties attended Court for a mention or a hearing.
45. In the end, this Court finds that the application herein is merited and is allowed in the following terms:
- i. The Taxing Officers Ruling delivered on 3rd February 2022, on the respondent’s Advocate-Client bill of costs dated 8th October 2021 is hereby set aside in its entirety;
 - ii. The Advocate-Client bill of costs dated 8th October 2021 is hereby taxed at Kshs. 41,992/= inclusive of VAT at 16%;
 - iii. Costs of this application to be borne by the respondent.

RULING DELIVERED, DATED AND SIGNED AT NAIROBI THIS 21ST DAY OF MARCH 2024.

.....

P. MULWA

JUDGE

In the presence of:

Mr. Nyakweba h/b for Mr. Njagi for Applicant

Mr. Odipo for the respondent



Court Assistant: Carlos

